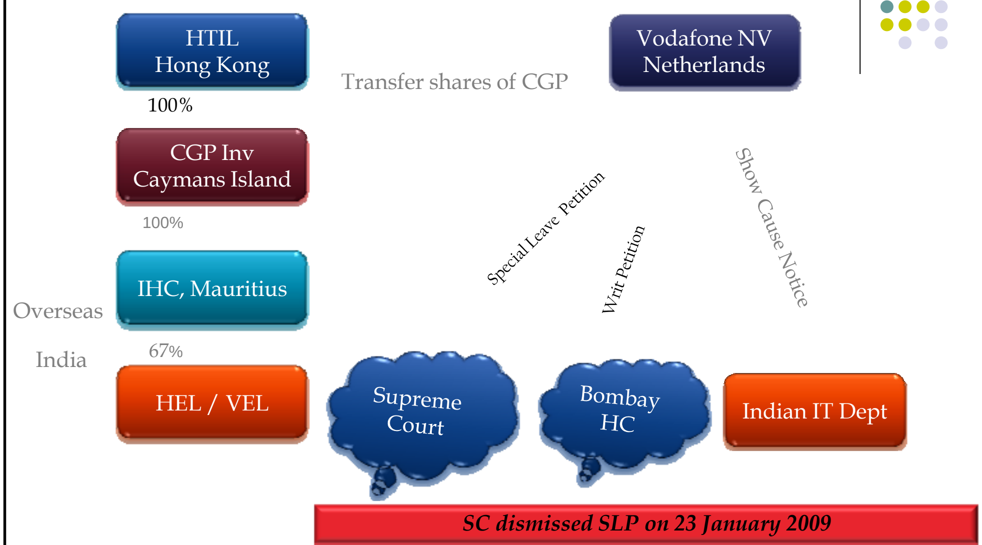
Vodafone International Holding B.V



Vodafone Case

Which of the following is the Capital assets transferred ?

(i) Business/economic interest in a group, joint venture (quasi partnership) interest in India – successor in interest

(ii) Right to telecom license, use of brand, goodwill and non compete right

(iii) Right to enter Indian market

(iv) Controlling interest, indirect equity interest, loan interest, right to manage?

- **Whether provisions of Section 195 have extra territorial application which creates an obligation to withhold tax under Section 195 in an offshore transaction involving two non-residents and payment outside India, even assuming that such transaction is chargeable to tax?**

- **Whether the transaction is chargeable to tax in India for Vodafone NL to be under a withholding tax obligation?**

Tax Authorities key argument

- **Section 9(1)(i) – There is income chargeable to tax in India**
  - **The subject matter of the transaction is not shares of a shell overseas company but transfer of interests, tangible and intangible in an Indian company**

Vodafone's Key Arguments

Section 9(1)(i) – There is no income chargeable to tax in India:

- **The transfer is between two Non-residents of a Foreign Company's shares with payment received / settled outside India**
- **There is no transfer of capital asset situated in India**
- **Share capital is situated at the registered office i.e. overseas**
- **Controlling interest is not distinct from shares but incidental**
- **The words indirectly in Section 9(1)(i) do not apply to Capital Asset Transfer**

Section 195 – Territorial Operations

- **Section 195 has only territorial applicability**
- **It does not apply to non-resident having no presence in India**

Key observations of the Bombay HC

- Subject matter of transaction between Vodafone and HTIL is transfer of interests, tangible and intangible in Indian companies of Hutch Group in favor of Vodafone and not an innocuous acquisition of shares of CGP.
- Prima facie, HTIL has earned income liable for capital gains tax in India as the income was earned towards sole consideration of transfer of its business / economic interest as a Group, in favour of Vodafone.
- Under the share transfer agreement, FIPB approval was mandatory and Vodafone reserved the right to cancel agreement if FIPB does not grant approval.
- Under FIPB approval, Vodafone bound to comply with all Indian laws including Indian Income-tax Act.
- Although shares may be an asset, they also may be merely a mode or vehicle used to transfer some other asset (s) (as in the present case)
- Vodafone becomes a successor in interest in the JV between HTIL and Essar Group and also becomes a co-licensee with the Essar Group to operate mobile telephony in India

Key observations of the Bombay HC

- Purpose of transaction was:
  - To enable Vodafone to acquire controlling interest in HEL by acquiring direct and indirect equity and loan interest
  - To acquire the right to manage HEL by appointing its own directors on the board
  - To enable Vodafone to successfully pierce the Indian mobile market to enlarge global presence
- Controlling interest must necessarily be preceded by extinguishment of right, title and interest in the shares of the Indian group
- Divestment in interest of enormous value in shares by HTIL would result in enduring benefit and acquisition of a capital asset in India by Vodafone, resulting in capital gains in the hands of HTIL chargeable to tax in India
- Having admitted that HTIL has transferred 67% interest in HEL qua shareholders, FIPB, statutory authorities in USA/ Hong Kong, neither Vodafone not HTIL can take a different stand before Indian tax authorities

Key observations of the Bombay HC

- Establishing nexus with India (para 149)
  - Agreement was conditional upon the approval of the Indian regulatory authorities,
  - Nexus was established even before the payment was made on 8th May, 2007
- **Transfer of capital asset in India (para 157)**
  - ***Prima facie*** **case made by Revenue that transaction amounts to transfer of a capital asset**
    - **Interest in Telecom License is jointly held with the Essar Group coupled with the use of Brand and Goodwill and non-compete**
    - **Right to enter into Telecom Business in India, with a control premium**
- **Shares, a look beyond approach (para 161)**
  - **Shares in a company - a mere vehicle to transfer some other assets**
  - **Choice in selecting a particular mode of transfer will not alter or determine the nature or character of the asset**
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